

## STANDARD CRIMINAL 5b(1)

### BURDEN OF PROOF

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove each element of each charge beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find [him][her] guilty. If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

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**SOURCE:** *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), with the addition of the language contained in the second sentence of the first paragraph.

**COMMENT:** This is the instruction verbatim from *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), with the addition of the language contained in the second sentence of the first paragraph. In *State v. Van Adams*, 194 Ariz. 408, 418, 984 P.2d 16, 26 (1999), the Arizona Supreme Court rejected a challenge to the "firmly convinced" language in the *Portillo* instruction, and stated: "We have clearly indicated our preference for this instruction, which is based upon the Federal Judicial Center's proposed instruction." 194 Ariz. 408, ¶ 30. This instruction is included for those who are of the opinion that the Arizona Supreme Court has mandated that the courts must now use only the exact language given in *Portillo*. The Committee believes, however, that the *Portillo* instruction is incorrect to the extent that it states that the preponderance of the evidence standard and the clear and convincing evidence standard apply only in a civil case. In a criminal case, facts in general must be proved by a preponderance of the evidence, and certain specific facts must be proved by either a preponderance of the evidence or by clear and convincing evidence. A.R.S. § 13-205(A) (unless otherwise provided, a defendant must prove an affirmative defense by a preponderance of the evidence); A.R.S. § 13-206(B) (defendant must prove entrapment by clear and convincing evidence); A.R.S. § 13-502 (defendant must prove legal insanity by clear and convincing evidence ); *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (State must prove by clear and convincing evidence that defendant committed other act). Standard Criminal 5b(2) defines these other standards for the jurors.

